IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 458 OF 2005

M/s. CITY ENGINEERING WORKS .. PETITIONER

Vs.

SMT. JAMANABAI R.VANDEKAR & ORS. RESPONDENTS

Mr. A.K. Abhyankar i/b P.S. Shah for petitioner

Mr. P. A. Thorat for respondents

CORAM:-SMT. RANJANA DESAI, J.

DATED:-11/4/05

P.C.

The petitioner is the original defendant in R A E & R Suit No. 403/870 of 1992, filed in the Small Causes Court at Mumbai for possession of the suit premises on the ground of non-payment of arrears of rent. The respondents are the original plaintiffs.

2. The suit was decreed on 25/8/92. The trial court held that the plaintiffs are entitled to recover vacant possession of the suit premises and arrears of rent amounting to Rs.28,299.05 and mesne profits. The plaintiffs took out

Notice before execution being Misc. Notice No. 515 of 2000. Misc. Notice No. 570 of 2001 was taken out by the defendant to record the settlement and/or compromise arrived at between the parties after passing the decree and in the alternative to obtain the declaration that the decree passed on 23-8-93 has been extinguished. The trial court made notice taken out by the plaintiffs absolute and discharged the notice taken out by the defendant. The defendant preferred Revision Application No. 25 of 2003 in Misc. Notice No. 515 of 2000 and Revision Application No. 26 of 2003 in Misc. Notice No. 570 of 2001. By the impugned judgment the said revision applications came to be dismissed and hence this writ petition.

3. Mr. Abhyankar, learned counsel appearing for the defendant contended that the plaintiffs by their letter dated 26/10/94 agreed not to execute the decree. They had agreed to withdraw the suit. The rent for the subsequent period was accepted by the plaintiffs. The plaintiffs passed receipts for the same. This amounted to creation of new tenancy. He submitted that the courts below erred in not appreciating the fact that the decree passed on 23//8/93 was extinguished. Mr Abhyankar submitted that in the circumstances the defendant's notice ought to have been made absolute.

4. It is true that by letter dated 26/10/94 the plaintiffs conveyed to the defendant that they had received a sum of Rs.41,831-90 as rent and in

view of this he would withdraw the suit. It is also true that thereafter the plaintiffs had issued rent receipts. The plaintiffs addressed another letter dated 13/3/97 calling upon the defendant to pay mesne profits. The defendant sent its reply dated 12/5/97. In this letter, the defendant did not contend that the plaintiffs have created fresh tenancy. It is only in the instant notice that the defendant has come out with this case. Therefore, it is difficult to acept this case.

5. Morever, if the matter was setled out of court, it was necessary for the defendant to have recourse to Order 21 Rule 2 of the Code of Civil Procedure, which provides for cases where a judgment debtor makes payment to the decree holder out of court for adjustment of the decree. An uncertified payment of money or adjustment which is not recorded by the court under Order 21 Rule 2 of the Code of Civil Procedure cannot be recognised by the executing court. In this connection I may usefully refer to the following observations of the Supreme Court in **Sultana Begum v. Prem Chand Jain, (1997) 1 S C C 373**:

> "It is open to the parties namely, the decree-holder and the judgment-debtor to enter into a contract or compromise in regard to their rights and obligations under the decree. If such contract or compromise amounts to an adjustment of the decree, it has to be recorded by the court under Rule 2 of Order 21. An agreement,

> contract or compromise which has the effect of extinguishing the decree in whole or in part on account of decree being satisfied to that extent will amount to an adjustment of the decree within the meaning of this rule and the court, if approached, will issue the certificate of adjustment. An uncertified payment of money or adjustment which is not recorded by the court under Order 21 Rule 2 cannot be recognised by the executing court."

The present case will be covered by the above observations of the Supreme Court.

9. The decree in question is dated 26/8/93. It is the case of the defendant that the plaintiffs accepted the rent pursuant to the letter dated 26/10/94. Under Article 125 of the Limitation Act, 1963, the satisfaction of the decree has to be recorded within 30 days. But the notice was taken out by the defendant on 13/9/2001. Therefore, the notice is not within limitation.

10. In view of the above in my opinion, there is no merit in this petition. The petition is, therefore, dismissed.

11. At this stage Mr. Abhyankar, learned counsel for the petitioner prays that the impugned order be stayed. In the circumstances, the execution of the impugned order is stayed for a period of 12 weeks from today on the petitioner giving undertaking that the petitioner will not

create any third party interest in the suit premises and after expiry of stay period, if the petitioner is unable to get any favourable order from the Supreme Court then petitioner will handover peaceful possession of the suit premises to the respondents.

12. Parties to act on authenticated copy of this order.

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